RECORD AND BRIEFS

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No. 14-10154

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN L. VOISINE AND
WILLIAM E. ARMSTRONG, III, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' Maine convictions for misdemeanor domestic violence assault and misdemeanor assault against a domestic partner qualify as "misdemeanor crime[s] of domestic violence" for purposes of 18 U.S.C. 922(g)(9), which prohibits the possession of firearms by persons who have previously been convicted of a misdemeanor crime of domestic violence.

2. Whether Section 922(g)(9), as applied to petitioners, violates the Second Amendment.

3. Whether Section 922(g)(9), as interpreted in United States v. Hayes, 555 U.S 415 (2009), violates the Commerce Clause, the Ex Post Facto Clause, the Fifth Amendment, or the Sixth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet App. A1-A98) is reported at 778 F.3d 176 A prior opinion of the court of appeals in petitioner Armstrong's case is reported at 706 F.3d 1 A prior opinion of the court of appeals in petitioner Voisine's case is not published in the Federal Reporter but is reprinted at 495 Fed. Appx. 101

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2015 A petition for rehearing was denied on March 31, 2015

(Pet App. B1). The petition for a writ of certiorari was filed on June 4, 2015. The jurisdiction of this Court is invoked under 28 U.S C. 1254(1).

STATEMENT

Following conditional guilty pleas in the United States District Court for the District of Maine, petitioners were convicted of possessing firearms or ammunition, or both, after having been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). Petitioner Voisine was also convicted of killing a bald eagle, in violation of 16 U.S.C 668(a). Petitioner Armstrong was sentenced to three years of probation. Petitioner Voisine was sentenced to one year and one day of imprisonment, to be followed by two years of supervised release The court of appeals affirmed petitioners' convictions in separate opinions. United States v. Armstrong, 706 F 3d 1 (1st Cir 2013); United States v. Voisine, 495 Fed. Appx. 101 (1st Cir 2013) (per curiam) (unpublished). This Court granted their joint petition for a writ of certiorari, vacated the judgments, and remanded to the court of appeals for further consideration in light of United States v. Castleman, 134 S. Ct. 1405 (2014). See 134 S. Ct. 1759 (2014) The court of appeals again affirmed. Pet App. A1-A98

1 Under 18 U S C 922(g)(9), it is unlawful for any person "who has been convicted in any court of a misdemeanor

crime of domestic violence to * * * possess in or affecting commerce, any firearm or ammunition." Section 921(a)(33)(A) defines a "misdemeanor crime of domestic violence" as a misdemeanor under federal, state, or tribal law -- committed by a person with a specified domestic relationship with the victim -- that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A)(i) and (ii); see United States v. Hayes, 555 U.S. 415, 420-421 (2009). A person who knowingly violates that provision may be fined, imprisoned for not more than ten years, or both. 18 U S C 924(a)(2)

2. a. In 2002, petitioner Armstrong was convicted of assaulting his wife Pet App. A5. According to a police report, several years later, in 2008, Armstrong pushed his wife and hit her "hard" during an argument, leaving a "red mark." 706 F.3d at 2; Armstrong C.A. App. 75, 95. He was charged in Maine state court with misdemeanor domestic violence assault, in violation of Section 207-A(1)(A), which punishes any person who "violates section 207" if "the victim is a family or household member " Me. Rev. Stat Ann. tit 17-A, § 207-A(1)(A) (2006 & Supp. 2014). See Pet. App. A4-A5 Section 207, in turn, provides that "[a] person is guilty of assault if" he "intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." Me. Rev Stat

Ann. tit 17-A, § 207(1)(A) (2006); see Pet. App. A4 The state charging document alleged that Armstrong "did intentionally, knowingly or recklessly cause bodily injury or offensive physical contact" to his wife. Armstrong C.A. App. 33. Armstrong pleaded guilty to that offense and was sentenced to 180 days of imprisonment, with all but 24 hours suspended, and one year of probation. Id. at 40.

In May 2010, Maine police officers searched Armstrong's home and found six firearms and ammunition. Pet. App. A5. In April 2011, a federal grand jury in the District of Maine charged Armstrong with one count of possessing firearms and ammunition by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). Armstrong C.A. App. 11-12

Armstrong moved to dismiss the indictment, arguing that a conviction under Maine's domestic violence assault statute does not categorically qualify as a misdemeanor crime of domestic violence for purposes of Section 922(g)(9) because (1) it can be violated by reckless as well as intentional conduct, and (2) "offensive physical contact" does not necessarily involve violent "physical force." See Armstrong C.A. App. 13-14, 20-31. Armstrong also argued that if his prior conviction constitutes a misdemeanor crime of domestic violence, then Section 922(g)(9) violates the Second Amendment Id. at 13-20 The district

court denied the motion, see Pet. App. A6, and Armstrong thereafter entered a conditional guilty plea, reserving his right to appeal the denial of his motion to dismiss, Armstrong C.A. App. 49, 53. During the plea colloquy, the district court explained, and Armstrong acknowledged, that he would "not be able to raise * * * on appeal" any "other legal issues that * * * ha[d] not been raised" in his motion to dismiss. Id. at 56-57; see id. at 62-63. The district court sentenced Armstrong to three years of probation. Pet. App. A6 n.1.

b. In June 2003, petitioner Voisine was charged in Maine state court with simple assault, in violation of Section 207(1)(A). Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(A) (2006); see Voisine C.A. App. 33. The state charging document alleged that Voisine "did intentionally, knowingly or recklessly cause bodily injury or offensive physical contact to" his girlfriend and that "[t]he crime involved domestic violence." Voisine C.A. App. 33 According to a police report, Voisine's girlfriend had called 911 early one morning. Id. at 43. When a police officer arrived at the residence that Voisine and his girlfriend shared, his girlfriend told the officer that Voisine was drunk, that he "had slapped her in the face," and that "this was not the first time it happen[ed]." Ibid. The daughter of Voisine's girlfriend said she heard the slap from another room and found her mother lying on the floor Ibid. Voisine pleaded guilty to

the charged offense and was ordered to pay a $200 fine Id. at 30.

In November 2009, an anonymous caller contacted Maine authorities to report that Voisine had shot an eagle. Game wardens investigated and discovered that a bald eagle had been shot and killed with a rifle in an area where Voisine had been working. Voisine was found in possession of the rifle and eventually admitted that it was his and that he had shot the eagle. Voisine C.A. App. 53; see id. at 75-77.

In March 2011, the government filed an information charging Voisine with one count of possessing a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U S.C. 922(g)(9), and one count of killing a bald eagle, in violation of 16 U.S.C. 668(a) Voisine C.A. App. 10-11 Voisine moved to dismiss the first count, arguing that a conviction under Maine's simple assault statute does not categorically qualify as a misdemeanor crime of domestic violence for purposes of Section 922(g)(9) because (1) it can be violated by reckless as well as intentional conduct, and (2) "offensive physical contact" does not necessarily involve violent "physical force." See id. at 12, 19-27. Voisine also argued that if his Maine conviction constitutes a misdemeanor crime of domestic violence, then Section 922(g)(9) violates the Second Amendment Id. at 13-19 The district court denied the

motion, see Pet. App. A6, and Voisine thereafter entered a conditional guilty plea, reserving his right to appeal the denial of his motion to dismiss, Voisine C.A. App. 51-52, 62. During the plea colloquy, the court explained, and Voisine acknowledged, that he would "have no right of appeal * * * except [on] the issues that [he] ha[d] already raised." Id. at 73; see id. at 73-75. The court sentenced Voisine to one year and one day of imprisonment, to be followed by two years of supervised release. Pet. App. A6 n.1.

3 On appeal, petitioners renewed the arguments set forth in their motions to dismiss. Armstrong C.A. Br. 9-24, 37-44; Voisine C.A. Br. 9-24, 36-42 They also raised a due process objection for the first time, claiming that they had been deprived of a sufficient forum for litigating the issue of whether they had "engaged in any violent act" severe enough to disarm them. Armstrong C.A. Br 36; see id. at 30-37; Voisine C.A. Br 29-36 The court of appeals affirmed petitioners' convictions in separate opinions

a The court of appeals affirmed Armstrong's conviction in a published decision. 706 F 3d at 2-8 Relying primarily on its prior decisions in United States v Booker, 644 F 3d 12 (1st Cir 2011), cert denied, 132 S. Ct 1538 (2012), and United States v Nason, 269 F.3d 10 (1st Cir 2001), the court rejected each of Armstrong's arguments.

The court of appeals first considered Armstrong's argument that a conviction under Maine's domestic violence assault statute does not categorically qualify as a misdemeanor crime of domestic violence for purposes of Section 922(g)(9) because (1) it can be violated by reckless as well as intentional conduct, and (2) "offensive physical contact" does not necessarily involve violent "physical force." 706 F.3d at 3-6. The court explained that it had held in Booker "that an offense with a mens rea of recklessness may qualify as a 'misdemeanor crime of domestic violence' under [Section] 922(g)(9)." Id. at 4 (quoting Booker, 644 F.3d at 21). And, in Nason, it had held that the phrase "physical force" was "broad enough to encompass the 'offensive physical contact' variant of Maine's assault statute." Ibid. (citing Nason, 269 F.3d at 16, 20-21) The court then explained that this Court's decision in Johnson v United States, 559 U S. 133 (2010), did not change the analysis, because "Johnson explicitly avoided deciding the question at issue here." Armstrong, 706 F.3d at 6 (citing Johnson, 559 U.S. at 143-144). Accordingly, the court concluded that Section 922(g)(9) "on its face, its legislative history and this court's precedent do not distinguish between 'violent' or 'non-violent' misdemeanor convictions when they involve the kind of conviction at issue here " Ibid.

The court of appeals also rejected Armstrong's Second Amendment challenge to Section 922(g)(9) Armstrong, 706 F.3d at 7-8. The court explained that, in Booker, it had rebuffed a similar challenge to Section 922(g)(9) after finding a "substantial relationship between [Section] 922(g)(9)'s disqualification of domestic violence misdemeanants from gun ownership and the governmental interest in preventing gun violence in the home." Id. at 7 (quoting Booker, 644 F.3d at 25). The court explained that Armstrong's "attempt[] to distinguish" his case from Booker by characterizing his challenge as "as-applied" rather than "facial" was unavailing. Ibid. The court noted that while it "ha[d] not adopted intermediate scrutiny as the appropriate type of review for" such a challenge, Armstrong's claim would fail "under any standard" because "a sufficient nexus exists here between the important government interest" (i.e., "preventing domestic gun violence") and "the disqualification of domestic violence misdemeanants like [Armstrong] " Id. at 7-8 (citation omitted).

Finally, the court of appeals reviewed Armstrong's due process challenge for plain error 706 F 3d at 6 The court found "no error, let alone plain error," because there was no "requirement that the government * * * prove the degree of violence inherent in the underlying domestic misdemeanor conduct of a defendant charged under" Section 922(g)(9) Ibid.

b. The court of appeals affirmed Voisine's Section 922(g)(9) conviction in an unpublished, per curiam decision. 495 Fed. Appx. at 101-102. Finding "no pertinent factual differences distinguishing the instant case from Armstrong," the court "incorporate[d] its reasoning." Id. at 102.

4. Armstrong and Voisine filed a joint certiorari petition in this Court, seeking review of their statutory, Second Amendment, and due process claims In March 2014, this Court (134 S. Ct. at 1759) granted certiorari, vacated the judgments in both cases, and remanded to the court of appeals "for further consideration in light of United States v. Castleman," 134 S. Ct. at 1405.

5. On remand, a divided panel of the court of appeals again affirmed petitioners' convictions Pet. App. A1-A98.

a. First, the court of appeals concluded that petitioners' Maine convictions for misdemeanor domestic violence assault and misdemeanor assault against a domestic partner qualified as "misdemeanor crime[s] of domestic violence" for purposes of 18 U S.C 922(g)(9). Pet App. A8-A25 The court pointed out that, in Castleman, this Court addressed "whether the phrase 'use of physical force' in [Section] 921(a)(33)(A) require[s] violence or [can] be satisfied by offensive touching " Id. at A7 Castleman, the court noted, "resolved the question in agreement with Nason, holding that Congress

incorporated the common-law meaning of 'force' -- namely, offensive touching -- in [Section] 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence '" Id. at A7-A8 (some internal quotation marks omitted) (quoting Castleman, 134 S. Ct. at 1410).

The remaining question was whether, after Castleman, "the Maine [assault] statute -- including the reckless acts it prohibits -- categorically fits within [Section] 922(g)(9)." Pet. App A9. The court of appeals answered that question in the affirmative. Id. at A9-A25. In doing so, it repeatedly emphasized the "unique nature of [Section] 922(g)(9)." Id. at A2; see id. at A10, A15. "[C]ontext matters," the court observed, and unlike other statutes that incorporate the phrase "use of physical force," Section 922(g)(9) is aimed at "domestic violence," which is "a term of art that encompasses a range of force broader than that which constitutes 'violence' simpliciter, including acts that might not constitute 'violence' in a nondomestic context." Id. at A9, A12 (some internal quotation marks omitted) (quoting Castleman, 134 S. Ct. at 1411 & n.4) The court relied on Section 922(g)(9)'s drafting history as well in concluding that the statute is "broader" than 18 U S C. 16, which is directed at the use of force in a nondomestic context Pet App A12-A13 (quoting Booker, 644

F.3d at 19, which recognized that "Congress expressly rejected" the Section 16(a) definition when drafting Section 922(g)(9)).

The court of appeals acknowledged (Pet. App. A8) that Castleman, in a footnote, cited decisions from other circuits that suggested "merely reckless causation of bodily injury * * * may not be a 'use' of force" (134 S. Ct. at 1414 & n.8). But the court emphasized that Castleman "did not say" that the First Circuit's prior holding in Booker -- that an offense with a mens rea of recklessness may qualify as a Section 922(g)(9) predicate -- "was wrong." Pet. App. A8. The court also pointed out that none of the recklessness decisions cited in Castleman addressed Section 922(g)(9); rather, most of them construed Section 16 and Sentencing Guidelines § 2L1.2(b)(1). Pet. App. A10-A13 & n.3. The court noted that only one case arose in "the domestic violence context," and that case addressed 8 U.S.C. 1227(a)(2)(E)(i), a statute that incorporates Section 16's definition of a "crime of violence" instead of Section 921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence " Pet App. A13 (citing Fernandez-Ruiz v Gonzales, 466 F.3d 1121, 1124 (9th Cir 2006) (en banc)).

Turning to Maine law, the court of appeals emphasized that "Maine characterizes recklessness as a mens rea involving a substantial amount of deliberateness and intent," inasmuch as "[t]he statutory definition requires that a person 'consciously

disregard[] a risk that the person's conduct will cause' the result " Pet. App. A18 (quoting Me Rev Stat. Ann. tit. 17-A, § 35(3)(A) (Supp. 2014)). Moreover, the court pointed out, "[t]he disregard of the risk is 'viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person.'" Ibid. (quoting Me. Rev. Stat. Ann. tit. 17-A, § 35(3)(C) (Supp. 2014)). Because of these "volitional component[s]," id. at A20, the court concluded that "[r]eckless assaults in Maine" categorically constitute "misdemeanor crime[s] of domestic violence" under Section 922(g)(9), which extends to "scenarios without clear intent," id. at A18, A21; see id. at A18 (noting that Section 922(g)(9)'s sponsor, Senator Lautenberg, suggested the statute would apply to "scenarios * * * in which domestic arguments 'get out of control,' 'the anger will get physical,' and one partner will commit assault 'almost without knowing what he is doing'") (quoting 142 Cong Rec. 26674 (1996)).

The court of appeals cautioned that it was "not decid[ing] that recklessness in the abstract is always enough to satisfy [Section] 922(g)(9)." Pet App. A24 Rather, the court "decide[d] only that the Maine definition is sufficiently volitional that it falls within the definition of 'use of physical force' applied in [Section] 922(g)(9) " Ibid.; see id.

at A3 (emphasizing the "narrow[]" scope of the court's ruling); id. at A27 ("The question before us is a narrow one.").

b. The court of appeals also rejected petitioners' "renew[ed]" Second Amendment claim, finding it "foreclosed" by the court's prior decisions in Booker, 644 F.3d at 22-26, Armstrong, 706 F.3d at 7-8, and United States v. Carter, 752 F.3d 8, 12-13 (1st Cir. 2014). Pet. App. A25.

c. Finally, the court of appeals rejected (Pet. App. A25-A27) a claim petitioners raised for the first time after Castleman in their joint supplemental brief: that Section 922(g)(9), as interpreted in Hayes, supra, violates the Ex Post Facto Clause and the Fifth and Sixth Amendments. Pet. Supp. C.A. Br. 30-33. Hayes held that a "domestic relationship, although it must be established beyond a reasonable doubt in a [Section] 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense." 555 U.S. at 418 According to petitioners, Section 922(g)(9), so construed, is an ex post facto law and violates the right to a jury trial because "the defendant cannot have been 'convicted' of the [Section 922(g)(9) predicate] until a jury so finds," and "[t]hat finding will not occur until after the conduct (possession of a firearm) has been completed." Pet Supp. C.A. Br 32

The court of appeals stated that, because petitioners' new constitutional claim was "outside the scope of [this] Court's

remand," Pet App. A25, petitioners had to demonstrate that consideration of the claim was "necessary to avoid extreme injustice," id. at A26 (citation omitted) The court reasoned that there could be no extreme injustice where Hayes had "already rejected arguments very similar to" petitioners' new claim. Ibid. (citing Hayes, 555 U.S. at 421). The court also concluded that Descamps v. United States, 133 S. Ct. 2276 (2013), did not "implicitly overrule[]" Hayes, as petitioners contended. Pet App. A26-A27. The court explained that whereas Descamps forbids courts from "evaluat[ing] the predicate conviction to determine a fact about it," the issue of whether a predicate conviction "involved a domestic relationship" for purposes of Section 922(g)(9) "is an element proved anew in the [Section] 922(g)(9) proceeding" itself Ibid.

d. Judge Torruella dissented. Pet. App. A28-A98 In his view, when this Court granted, vacated, and remanded "for further consideration in light of * * * Castleman," see 134 S Ct at 1759, it "implicitly suggest[ed]" that the court of appeals "bring [its] holdings in line with" the recklessness decisions that Castleman cited. Pet App. A28 (citing Castleman, 134 S. Ct. at 1414 n.8). Judge Torruella argued that the text of Section 922(g)(9) reinforced that conclusion, because it is "nearly identical" to "the operative language" of Section 16, under which "the 'use' of physical force requires

the active or intentional employment of force," not "merely reckless conduct." Id. at A29-A30 Judge Torruella also stated that, to the extent Section 922(g)(9) presents "a 'close' question" about recklessness, he would invoke the rule of lenity to "foreclose[] [petitioners'] convictions here " Id. at A31

ARGUMENT

Petitioners argue (Pet. 24-31) that convictions under Maine's assault statutes do not qualify as misdemeanor crimes of domestic violence for purposes of 18 U.S.C. 922(g)(9) because the Maine statutes can be violated by reckless as well as intentional conduct. The court of appeals correctly rejected that contention, and its decision does not conflict with United States v. Castleman, 134 S. Ct. 1405 (2014), or any decision of another court of appeals. Review of the statutory question is therefore not warranted.

Further review of the other questions presented is likewise unwarranted. The court of appeals correctly rejected petitioners' Second Amendment claim, which implicates no cognizable conflict of authority Petitioners' other constitutional claim -- that Section 922(g)(9), as construed in United States v. Hayes, 555 U.S. 415 (2009), violates the Commerce Clause, the Ex Post Facto Clause, and the Fifth and Sixth Amendments -- was not properly preserved in the courts below nor within the scope of this Court's remand for further

consideration in light of Castleman. In any event, that claim, too, lacks merit and implicates no conflict of authority.

1. Petitioners argue (Pet. 24-31) that convictions under Maine's assault statutes do not qualify as misdemeanor crimes of domestic violence for purposes of Section 922(g)(9) because the Maine statutes can be violated by reckless offensive contact as well as intentional conduct.[1] The court of appeals correctly rejected that argument, and its decision does not conflict with Castleman or any decision of another court of appeals.

a. The decision below is correct. As the court of appeals explained in United States v. Booker, 644 F.3d 12 (1st Cir 2011), cert. denied, 132 S. Ct. 1538 (2012), the definition of "misdemeanor crime of domestic violence" in 18 U.S.C. 921(a)(33)(A) does not specify any required mens rea. 644 F.3d at 18, 20-21. "In common parlance, a 'use of physical force' may be described as reckless or intentional " Id. at 18

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[1] Under Maine law, "[a] person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result " Me Rev Stat Ann. tit. 17-A, § 35(3)(A) (2007) "[T]he disregard of the risk" is "viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person," and it "must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation " Id. § 35(3)(C) Maine courts have interpreted "offensive physical contact" to mean "something less than bodily injury," but "more than a mere touching of another " United States v Nason, 269 F 3d 10, 19 (1st Cir 2001) (quoting State v Pozzuoli, 693 A.2d 745, 747 (Me 1997))

(citation omitted); cf. Leocal v. Ashcroft, 543 U S. 1, 9, 13 (2004) (concluding that the phrase "use . . . of physical force against the person or property of another" in 18 U.S.C. 16(a) "most naturally suggests a higher degree of intent than negligent or merely accidental conduct," but reserving judgment as to recklessness).

That conclusion is consistent with the "more specialized legal usage" of the phrase "use of physical force" to describe the common-law crime of battery. Johnson v. United States, 559 U.S. 133, 139-140 (2010). The crime of battery has traditionally encompassed both intentional and criminally negligent or reckless infliction of harm. See 2 Wayne R. LaFave, Substantive Criminal Law § 16.2(c)(2), at 557 (2d ed. 2003) (LaFave); see also, e.g., Commonwealth v. Hawkins, 32 N.E. 862, 863 (Mass 1893) (holding that a reckless shooting qualifies as a battery; explaining that if the victim "had died from the pistol shot, the defendant, on the facts found by the jury, would have been guilty of manslaughter As she survived the injury, the same principle now requires a conviction of assault and battery"). Consistent with that background, "a substantial majority of the battery-type statutes" in modern criminal codes "expressly state that the crime may be committed by recklessness " LaFave § 16 2(c)(2), at 557; cf Model Penal Code § 211 1(a) (1985) ("A person is guilty of assault if he

* * * attempts to cause or purposely, knowingly or recklessly causes bodily injury to another.").[2] Here, where Congress has employed the common-law definition of misdemeanor battery to define the term "misdemeanor crime of domestic violence," see Castleman, 134 S. Ct. at 1411, the most natural conclusion is that Congress intended to include battery crimes, like the Maine assault offenses at issue in this case, that punish "volitional" conduct involving a "conscious[] disregard[]" of the risk involved, Pet. App. A18, A20 (second set of brackets in original; emphasis omitted) (quoting Me. Rev Stat. Ann. title 17-A, § 35(3)(A) (Supp. 2014)).

b. Contrary to petitioners' contention (Pet 25-27), the decision below is consistent with Castleman. There, the Court considered whether the defendant's misdemeanor conviction, under Tennessee law, of having "intentionally or knowingly cause[d] bodily injury to the mother of his child" qualified as a "misdemeanor crime of domestic violence" under Section 922(g)(9) 134 S. Ct. at 1408 (citation and internal quotation

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[2] In Johnson, the Court described common-law battery as "the intentional application of unlawful force against the person of another " 559 U S. at 139 As LaFave explains, while some courts have spoken of criminal batteries as necessarily involving "intent" to injure, they have also treated reckless or criminally negligent conduct as supplying the necessary intent See LaFave § 16 2(c)(2), at 556 & n.32; see also Rollin M. Perkins, Non-Homicide Offenses Against the Person, 26 B.U L. Rev 119, 125-126 (1946)

marks omitted). At the outset of its analysis, the Court held that Section 921(a)(33)(A)'s inclusion of the phrase "use of physical force" "incorporates the common-law meaning of 'force' -- namely, offensive touching." Id. at 1410. Distinguishing 18 U.S.C. 924(e)(1), which applies to "violent felon[ies]," and 18 U.S.C 16, which applies to "crime[s] of violence," the Court emphasized that Section 922(g)(9) extends to "[d]omestic violence." 134 S. Ct. at 1410-1411 & n.4. And "[d]omestic violence," the Court explained, is "not merely a type of 'violence'" but rather "a term of art" that "encompasses a range of force broader than that which constitutes violence simpliciter " Ibid. Taking those precepts together, the Court concluded that the defendant's Tennessee offense qualified as a "misdemeanor crime of domestic violence" under Section 922(g)(9) Id. at 1416.

In reaching that conclusion, the Court reserved the question of whether a conviction with a mens rea of recklessness could qualify as a Section 922(g)(9) predicate Castleman, 134 S. Ct at 1414. In dicta, however, the Court noted that "the merely reckless causation of bodily injury under" Tennessee law "may not be a 'use' of force," ibid., and it cited in a footnote several court of appeals decisions holding that recklessness is not a "use of force" under Section 16 and Sentencing Guidelines § 2L1 2(b)(1), id. at 1414 n.8

As the court of appeals pointed out (Pet. App A8), Castleman did not resolve the question presented here or otherwise abrogate the First Circuit's prior decision in Booker, which held that "an offense with a mens rea of recklessness may qualify as a 'misdemeanor crime of domestic violence' under [Section] 922(g)(9)." 644 F.3d at 21. And for at least two reasons, it would not be appropriate to read Castleman's mere citation of cases arising under 8 U.S.C. 1227(a)(2)(E)(i), 18 U.S.C 16, and Sentencing Guidelines § 2L1.2(b)(1) as an implicit conclusion that an offense with a mens rea of recklessness may never qualify as a misdemeanor crime of domestic violence under Section 922(g)(9). First, Castleman itself distinguished Section 922(g)(9) from those other provisions on the ground that "'[d]omestic violence' is not merely a type of 'violence'" but rather "a term of art" that "encompasses a range of force broader than that which constitutes 'violence' simpliciter." 134 S. Ct. at 1411 & n.4.

Second, the recklessness question was not squarely presented in Castleman, because the relevant portion of the Tennessee statute prohibited "intentionally or knowingly caus[ing] bodily injury " 134 S Ct at 1409 (citation omitted) The parties thus did not brief the recklessness question. See U.S. Br. at 8 n.5, Castleman, supra (No. 12-1371) ("Because respondent was specifically charged with and convicted

of the intentional or knowing causation of bodily injury * * * , the question whether 'reckless' conduct is included within the definition of a 'misdemeanor crime of domestic violence' is not presented.") [3]

c. Nor, finally, does the decision below implicate any conflict among the circuits about the scope of Section 922(g)(9). As the court of appeals detailed (Pet. App. A11 n.3, A13-A15), each of the decisions petitioners cite in support of their claim of a conflict (Pet. 27-31) involved a provision other than Section 922(g)(9) and thus did not address the meaning of a "misdemeanor crime of domestic violence" as Section 921(a)(33)(A) "unique[ly]" defines that term. See United States v. Palomino Garcia, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (Sentencing Guidelines § 2L1.2(b)(1)); Jimenez-Gonzalez v

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[3] In his dissenting opinion below, Judge Torruella argued that when this Court granted, vacated, and remanded (GVR) in petitioners' case "for further consideration in light of * * * Castleman," Armstrong, 134 S. Ct. at 1759, it "implicitly suggest[ed]" that the court of appeals "bring [its] holdings in line with" the recklessness decisions that Castleman cited. Pet. App. A28 (citing Castleman, 134 S Ct at 1414 n.8). That is incorrect. As the court of appeals has elsewhere observed, "a GVR order is neither an outright reversal nor an invitation to reverse; it is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision and, if warranted, to revise or correct it." Gonzalez v Justices of Mun. Ct. of Boston, 420 F 3d 5, 7 (1st Cir 2005) (citing Tyler v. Cain, 533 U S. 656, 666 n 6 (2001); Henry v City of Rock Hill, 376 U S 776, 777 (1964) (per curiam)), cert denied, 546 U S 1181 (2006)

Mukasey, 548 F 3d 557, 559-563 (7th Cir. 2008) (18 U.S.C. 16); United States v. Zuniga-Soto, 527 F.3d 1110, 1123-1125 (10th Cir. 2008) (Sentencing Guidelines § 2L1.2(b)(1)); United States v. Torres-Villalobos, 487 F.3d 607, 613-617 (8th Cir 2007) (Section 16); United States v. Portela, 469 F.3d 496, 498-499 (6th Cir. 2006) (Sentencing Guidelines § 2L1.2(b)(1)); Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1124-1132 (9th Cir. 2006) (en banc) (8 U.S.C. 1227(a)(2)(E)(i)); Garcia v. Gonzales, 455 F.3d 465, 467-469 (4th Cir. 2006) (18 U.S.C. 16); Oyebanji v. Gonzales, 418 F.3d 260, 263-265 (3d Cir. 2005) (18 U.S.C. 16); Jobson v. Ashcroft, 326 F.3d 367, 372-376 (2d Cir. 2003) (18 U S C 16); United States v. Chapa-Garza, 243 F.3d 921, 924-928 (5th Cir 2001) (18 U.S.C. 16).

Petitioners cite no court of appeals decision holding that an offense with a mens rea of recklessness may never qualify as a misdemeanor crime of domestic violence under Section 922(g)(9), nor do they cite a decision that has addressed the issue since Castleman. Under those circumstances, reviewing the issue now would be premature Cf Elonis v. United States, 135 S Ct 2001, 2013 (2015) (declining to consider "whether recklessness suffices for liability under Section 875(c)," where "[t]here was and is no circuit conflict over the question"). That is especially so given the modest scope of the decision below As the court of appeals emphasized, it did not purport

to hold "that recklessness in the abstract is always enough to satisfy [Section] 922(g)(9) " Pet. App. A24. Rather, the court "narrowly" held (id. at A3) that Maine's definition of recklessness "is sufficiently volitional that it falls within the definition of 'use of physical force' applied in [Section] 922(g)(9)" (id. at A24). The courts of appeals should be given additional time to consider whether and under what circumstances the same conclusion should apply to "the standard definitions of recklessness in [other] jurisdictions" besides Maine (Pet 28).

2. Petitioners further contend (Pet. 16-24) that, as applied to them, Section 922(g)(9) violates the Second Amendment That claim, too, implicates no conflict among the courts of appeals and does not warrant further review.

a Since this Court held in District of Columbia v. Heller, 554 U S. 570 (2008), that the Second Amendment protects an individual right to keep and bear arms, several courts of appeals have addressed the constitutionality of Section 922(g)(9) in published opinions, and none has held that the statute is unconstitutional See United States v Chovan, 735 F 3d 1127, 1139 (9th Cir 2013) (upholding statute), cert denied, 135 S Ct 187 (2014); Booker, 644 F 3d at 22-26 (same); United States v Skoien, 614 F 3d 638, 641-642 (7th Cir 2010) (en banc) (same), cert denied, 562 U.S 1303 (2011); United States v White, 593 F 3d 1199, 1205-1206 (11th Cir 2010)

(same); cf. United States v. Staten, 666 F.3d 154, 162-163, 167-168 (4th Cir 2011) (rejecting Second Amendment challenge after assuming arguendo that defendant was entitled to some degree of Second Amendment protection notwithstanding his conviction and relying on the degree of force required under the circuit's prior decision in United States v. White, 606 F.3d 144, 153 (4th Cir. 2010) ("violent force * * * capable of causing physical pain or injury") (citation and emphasis omitted)), cert. denied, 132 S. Ct. 1937 (2012).[4] Courts have also rejected Second Amendment challenges to 18 U.S.C. 922(g)(8), which prohibits possession of a firearm by a person subject to a domestic violence protective order. See United States v Chapman, 666 F 3d 220, 224-231 (4th Cir. 2012); United States v. Bena, 664 F 3d 1180, 1182-1185 (8th Cir. 2011); United States v. Reese, 627 F.3d 792, 799-805 (10th Cir. 2010), cert. denied, 131 S. Ct. 2476 (2011) This Court denied review of several of those decisions, including Booker, and the same result is warranted here.

b. In the decision below, the court of appeals held that petitioners' Second Amendment claim was "foreclosed" by (inter

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[4] See also In re United States, 578 F 3d 1195, 1200 (10th Cir 2009) (unpublished order in appendix) (indicating that Section 922(g)(9) is "presumptively lawful" under Heller) (citation omitted); cf People v Flores, 86 Cal Rptr 3d 804, 806-807 (Cal Ct App 2008) (rejecting Second Amendment challenge to state statute disarming violent misdemeanants)

alia) its earlier decision in Armstrong's case. Pet App. A25 (citation omitted). There, relying on Booker, supra, the court held that Armstrong's claim would "fail[]" under any level of scrutiny "because a sufficient nexus exists * * * between the important government interest" in "preventing domestic gun violence" and disarming misdemeanants who engage in physical force of the sort proscribed by the Maine assault statutes. 706 F.3d at 7-8 (quoting Booker, 644 F.3d at 25). That conclusion is supported by a substantial body of empirical evidence that "[f]irearms and domestic strife are a potentially deadly combination." Castleman, 134 S. Ct. at 1408 (quoting Hayes, 555 U.S at 427); see, e.g., id. at 1409 (citing evidence that "[w]hen a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed"); see also Staten, 666 F 3d at 163-167; Booker, 644 F 3d at 25-26; Skoien, 614 F.3d at 642-644 Restrictions on gun ownership by persons convicted of abusing their domestic partners bear a clear connection to the important goals underlying Section 922(g)(9).

c. Petitioners argue (Pet 16-23) that Section 922(g)(9) cannot constitutionally be applied to persons who have committed offenses involving reckless infliction of harm or to those involving offensive but "non-violent" physical contact. Petitioners, however, are not well-situated to raise that claim because both engaged in intentional violence against their

respective victims. See Armstrong C.A. App. 75, 95 (Armstrong hit his wife "hard" and left a "red mark."); Voisine C.A. App. 43 (Voisine slapped his girlfriend.). Nor can petitioners invoke the Second Amendment rights of other defendants not before the Court. The overbreadth doctrine has no place in a Second Amendment challenge to a criminal indictment. Cf , e.g., Sabri v. United States, 541 U.S. 600, 608-610 (2004) (explaining that overbreadth challenges are recognized only "in relatively few settings" supported by "weighty" and "specific reasons," and otherwise "are especially to be discouraged"); Skoien, 614 F.3d at 645 ("A person to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present.").

But even if the overbreadth doctrine did apply here, it would not help petitioners Any claimant making an overbreadth challenge must show that the overbreadth is "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." United States v. Williams, 553 U.S. 285, 292 (2008). Petitioners assert that "[t]here are many" Section 922(g)(9) defendants who have been convicted of "non-violent reckless offenses" and "have never physically harmed their loved ones" (Pet 20), but they cite no compelling empirical evidence to that effect

3. Finally, petitioners argue (Pet. 8-16) that Section 922(g)(9), as interpreted in Hayes, supra, violates the Commerce Clause, the Ex Post Facto Clause, and the Fifth and Sixth Amendments. But petitioners waived that claim by failing to preserve the objection as part of their conditional guilty pleas. See Fed. R. Crim. P. 11(a)(2) (stating that a conditional guilty plea permits a defendant to "reserv[e] in writing the right to have an appellate court review an adverse determination of a specified pretrial motion"); United States v. Kingcade, 562 F.3d 794, 797 (7th Cir.) (stating that "[a]ll non-jurisdictional issues not specifically preserved in [a] conditional plea agreement are waived," and citing cases), cert. denied, 557 U.S. 945 (2009) The district court advised each petitioner during his change of plea hearing that, if he pleaded guilty, he would lose the right to appeal other legal issues that had not already been raised. See Armstrong C.A. App. 56-57, 62-63; Voisine C.A. App. 73.

Moreover, petitioners did not raise their present constitutional claim in their initial appeals Because this Court thereafter granted certiorari, vacated the court of appeals' judgments, and remanded solely "for further consideration in light of * * * Castleman," see 134 S Ct 1759, petitioners' claim is beyond the scope of the Court's remand and is not properly presented here The court of appeals concluded

as much, Pet. App. A26, and petitioners do not take issue with that record-bound procedural determination, or with the corollary conclusion that they must show that they would suffer "extreme injustice" absent consideration of their new constitutional claim, ibid.

In any event, even if petitioners had merely forfeited their present constitutional claim, review would be for plain error. See Fed. R. Crim. P. 52(b). Petitioners cannot demonstrate error, let alone plain error. They apparently ask the Court to overrule Hayes (Pet. 9), which held that a "domestic relationship, although it must be established beyond a reasonable doubt in a [Section] 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense " 555 U S at 418 According to petitioners, Section 922(g)(9), so construed, is an ex post facto law, violates the right to a jury trial, and exceeds Congress's authority[5] because "all persons with any misdemeanor assault conviction are banned

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[5] In addition to being waived and beyond the scope of the Court's remand, petitioners' invocation of the Commerce Clause (Pet 15-16) faces another procedural hurdle: they did not raise a Commerce Clause challenge in their post-remand supplemental briefing, and the court of appeals did not consider how the Commerce Clause might bear on their present constitutional claim. That is another reason review would be inappropriate here See United States v Williams, 504 U.S 36, 41 (1992) (Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below") (citation omitted).

from possessing firearms * * * with no jury ever having found the necessary statutory elements" in a "contemporaneous proceeding in which to establish the prohibiting [domestic] element." Pet. 12-13; see Pet. Supp. C.A. Br. 32 ("[T]he defendant cannot have been 'convicted' of the [predicate] crime until a jury so finds," and "[t]hat finding will not occur until" a federal prosecution, "after the conduct (possession of a firearm) has been completed."). Petitioners also argue (Pet. 10) that Section 922(g)(9), as construed in Hayes, "conflicts with" Descamps v United States, 133 S. Ct. 2276 (2013).

The court of appeals correctly rejected petitioners' argument. Pet. App. A26-A27. As the court explained, Descamps forbids a sentencing court from "evaluat[ing] the predicate conviction to determine a fact about it," whereas the issue of whether a predicate conviction "involved a domestic relationship" for purposes of Section 922(g)(9) is not an element of the predicate conviction, but "is an element proved anew in the [S]ection 922(g)(9) proceeding" itself. Ibid. Nothing is unconstitutional about that procedure, and petitioners do not suggest that any court of appeals has held otherwise. Before criminal punishment may be imposed under Section 922(g)(9), a defendant is entitled to a jury determination on all the elements of the federal offense, including the fact that the prior conviction had a domestic

component. See Hayes, 555 U S. at 418. And no ex post facto problem exists, because a defendant knows, at the time he chooses to possess a firearm, that he is subject to criminal punishment under federal law if he has a qualifying prior state conviction with a domestic component. Cf. United States v. Brady, 26 F.3d 282, 291 (2d Cir.) (rejecting ex post facto challenge to Section 922(g)(1), because defendant was able to "conform his conduct to the requirements of the law" in effect at the time he committed the firearm offense), cert. denied, 513 U.S. 894 (1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2015

No. 14-10154

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG, III, PETITIONERS

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, via email and first-class mail, postage prepaid, this 9th day of September, 2015.

[See Attached Service List]

SUPREME COURT, U.S.
2015 SEP 10 P 3:00

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September 9, 2015

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Case Management Supervisor, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

14-10154
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